Supreme Court, U.S.
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Case No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term 1998

JEHAN ZEB MIR ,

Petitioner , Plaintiff and Appellant

v

F.H.P.,Inc.

Respondent , Defendant and Appellees

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BRIEF FOR APPELLANT

Petitioner Pro-se ;

Jehan Zeb Mir , MD
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93 pp

QUESTION PRESENTED

Does District Court have jurisdiction to rule on a Federal Rule of Civil Procedure ; Rule 60 (b) motion after Notice of Appeal is filed ?

LIST OF PARTIES

The names of all parties appear in the caption of the case on the cover page and there are no additional parties.

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STATEMENT OF JURISDICTION

1. The district court had jurisdiction over subject matter of plaintiff's action due to removal of the action to that court under 28 U.S.C. ,1442 a

2. Jurisdiction in the Court of Appeals was premised on 28 U.S.C. 1291 in that plaintiff appealed from the final decision of the district court ,entered on February 19 , 1997.

3. Judgment of the Ninth Circuit was entered on February 8 ,1999 .The time period for filing the instant Petition for Writ of Certiorari is 90 days . (28 U.S.C. 2102 (c))

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit was filed on September 22,1998 and was not published . A copy of the Opinion appears in Appendix A.

The rehearing was denied on February 8,1999.A copy of rehearing order appears in Appendix B.

A copy of the order of the Ninth Circuit Court of Appeals on appellant's motion for remand for consideration of F.R.C.P.; Rule 60 (b) motion ,filed July 16 ,1997 is attached in Appendix C .

A copy of the Ninth Circuit Court's ruling for a motion for Reconsideration and Clarification for denial of motion for remand, filed October 14,1997, appears in Appendix D.

A copy of the District Court's Order denying appellant's motion to ask the court if it would entertain a Rule 60 (b) motion ,filed May 8,`1997 , is attached in Appendix E.

A copy of the District Court's separate unpublished opinion granting motion for attorney's fees , entered on February 18,1997 is attached in Appendix F.

A copy of the District Court's unpublished opinion granting motion for default summary judgment , filed June 26,1996 is attached in Appendix G .

RELATED DECISIONS

There are no related decisions .

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petition involves the provisions of the Federal Rule of Civil Procedure Rule 60,(b) which provides .

" (b) Mistakes; Inadvertence ; Excusable Neglect; Newly Discovered Evidence ; Fraud , etc. On motion and upon such terms as are just the court may relieve a party's legal representative from a final judgment ,order ,or proceeding for the following reasons: (1) mistake (2) inadvertence,surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been dis covered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic) misrepresentation,or other misconducy of an adverse party; (4) judgment is void (5) judgment has been satisfied , released ,or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated ,or it is no longer equitable that the judgment should have prospective application; (6) any other reason justifying relief from the operation of the judgment....."

STATEMENT OF THE CASE & FACTS

Plaintiff , JEHAN ZEB MIR , originally filed his complaint in the State Court as pro-se for payment of medical bills for emergency life threatening stab wounds of major abdominal blood vessels.

The defendant FHP,Inc. had fraudulently denied payment of the bill by alleging that plaintiff had performed surgery on a dead patient .The defendant knew that its allegations and the basis of denial of the medical bill were not true because prior to denying the bill , defendant had reviewed medical records and knew that the patient had vital signs during surgery.

Plaintiff ,appealed to defendant . The defendant denied appeal and instead reported to the hospital where surgery was performed that the plaintiff had performed surgery on a dead patient , causing great embarrassment to the plaintiff .

The hospital committee investigated the matter and wrote to defendant that the surgery was necessary. The defendant continued to refuse to pay.

The defendant litigated the matter in the State Court for several months and then removed the matter to the district court ,Central district ,State of California .

Plaintiff's office computer had broken down and plaintiff needed money to purchase a new computer .

The defendant's attorney informed plaintiff that the FHP,Inc. would pay all the money in the world to him to litigate this matter rather than pay anything to the plaintiff . However , on February 28 ,1995 , after plaintiff's deposition , plaintiff was able to reach an oral agreement with the defendant on the terms that the plaintiff will be *first* paid $ 6,000. on or before March 3 ,1995 ,then the plaintiff will dismiss the case .

The defendant breached the oral agreement by refusing to pay on the date agreed.

In order for re-negotiations to proceed and settle the matter , plaintiff and defendant took their respective motions for Remand and Summary Judgment off the motion calendar.

One of the grounds for plaintiff's motion for remand was based upon untimely Removal pursuant to 28,U.S.C. 1446 (b) ,which requires that the Notice of removal of civil action or proceedings shall be filed within thirty days . The defendant had litigated matter in the State Court for months.

The parties also stipulated that upon execution of the settlement agreement, a dismissal of the action shall be promptly filed with the Court.

On March 15 ,1995 , the defendant sent plaintiff a Settlement Agreement & Mutual Release but sent no check for the payment of the claim as agreed.

The check could have contained a stamped endorsement on the back of the check to be signed by the plaintiff that the payment was in full for all claims. This is not an uncommon practice employed by the insurance companies and health plans to use such endorsement when the checks are issued to contract providers. The defendant had no liability in issuing the check as agreed, since , the acceptance of payment would have been

in itself a primae facie evidence of settlement. That money still has not been paid .

Plaintiff refused to sign the Settlement Agreement and Mutual Release since the settlement Agreement had not complied with the terms and conditions of the oral agreement.

Confronting an impasse after telephone conversations with the defendant's attorney, plaintiff retained an attorney (late) Robert D. Walker on March 15 ,1995 to renegotiate the matter .

On March 18 , 1995 plaintiff notified defendant that he would be represented by an attorney. Attorney Walker notified defendant of his assuming representation of plaintiff.

On March 20 ,1995 , the defendant seeing an attorney on the scene ,without informing plaintiff or his attorney notified district court that the matter had been settled .

Based upon this communication , the district court dismissed the case without prejudice on April 10,1995 .

For several months , the settlement could not be reached because defendant would not pay more than $ 6000. to cover plaintiff's attorney charges in order for plaintiff to preserve its initial settlement amount of $ 6,000.

Plaintiff's attorney filed a complaint in the state court on May 3,1995 to protect four year statutes but did not serve the complaint in order for negotiations to continue with intent to settle the matter.

Failing settlement , the First Amended Complaint was filed on September 29,1995 and was served on October 6,1995. The amended complaint stated three State Causes of Action

(1) Breach of duty to Third Party

(2) Misrepresentation & Estoppel

(3) Statutory Violation of California Health & Safety Code ,Section 1371.4.

The defendant removed case to the Federal Court and filed a counter claim for breach of oral agreement.

The plaintiff's attorney (late)Robert Walker, defaulted on the answer to the counter claim and

then on defendant FHP,Inc. motion for summary judgment.

A default summary judgment was entered on June 26 , 1996 against plaintiff. (Appendix G)

The district court's order granting defendant's motion for attorney's fees for breach of oral contract after attaching to the terms of the oral contract the terms of 'general contract ' in an amount of $ 19,491.25 was entered on February 19, 1997.(Appendix F)

Plaintiff could not locate his attorney till March 18 ,1997 when the plaintiff substituted himself and was barely able to file a timely Notice of Appeal on the 30th day of the entry of Judgment.

Plaintiff filed a motion with the district court to ask if the district court would be willing to entertain a Rule 60 (b) motion pursuant to procedure prescribed in Smith v Lejune 588 F.2d 1304 ,1307 (9th Circuit, 1979)

Grounds for relief stated by plaintiff were based upon F.R.C.P. ; Rule 60 (b)
(i) Excusable Neglect,due to attorney negligence pursuant to Augusta Fiberglass Coating Inc. v

Fodas Contracting 843 F 2d 808 (4th Circuit, 1988)

ii) newly discovered evidence

(iii) fraud, misrepresentation, circumvention and other misconduct.

(iv) lack of subject matter jurisdiction . That plaintiff had genuine issues of material fact and a meritorious defense .

The district court denied the motion that it had no jurisdiction to rule on the F.R.C.P. ;Rule 60 (b) motion . (Appendix E)

Plaintiff then filed motion for remand with 9th Circuit Court of Appeals for consideration of Rule 60 (b) motion by the district court.

The Ninth Circuit Court denied the motion for remand for lack of proof that district court was willing to hear the Rule 60 (b) motion.(Appendix C)

Plaintiff's motion for Reconsideration and Clarification for denial of motion for remand was denied by the Ninth Circuit Court because the opening brief had been filed and case was ready for calendaring. (Appendix D)

On appeal , plaintiff raised three main issues .

1. District court's abuse of discretion in not granting a hearing on F.R.C.P.; Rule 60 (b) motion for relief for reasons of lack of jurisdiction.

2. Lack of district court jurisdiction since the third party independent state law claims of misrepresentation were not pre-empted by ERISA pursuant to Meadow v Employer Health Insurance (47 Fed 3rd. 1006 (9th Cir. 1995)

3. Lack of district court's jurisdiction to alter stipulated terms of the oral agreement by attaching on its own the terms of the 'general contract' in order to award attorney's fees to the defendant contrary to the provisions of F.R.C.P.; Rule. 41 (a) (1) (ii) . (Wright & Miller ,2363 ,Page 271,1996.) (In Re Wolf ; 842 F. 2d 464 (D.C. Cir. 1988) .

Award of attorney fees in case of breach had never been agreed upon in the oral agreement.

The Ninth Circuit Court in its opinion ruled that (Appendix A)

(1) the district court had no jurisdiction to rule on Rule 60 (b) motion

(2) The Claim was pre-empted by ERISA ,district court had removal jurisdiction. Plaintiff's actions directly implicated the terms of the defendant's health plan

(3) upheld the award of $19,491.25 in attorney fees on grounds differing from the one provided by the district court against plaintiff .

The grounds provided by the Ninth Circuit Court for award of attorney's fees to the defendant were breach of unexecuted Settlement Agreement while the district court had awarded attorneys fees by superimposing the terms of ' fundamental contract principle ' upon the stipulated terms of the oral agreement . (Appendix A-5 ; F-18)

Plaintiff petitioned for Rehearing and Suggestion for Appropriateness of an En- Banc hearing , based upon the latest ruling by the Ninth Circuit Court of Appeals that the district court can retain jurisdiction to rule on Rule 60 ,(b) motion after appeal is taken

(Stein v Wood. 127 F 3d 1187(9th Cir.Nov. 1997).

This ruling of the Ninth Circuit Court was based upon the decision of the United States Supreme

Court that pendency of appeal does not affect the district court's power to grant Rule 60 (b) relief. (Stone v I.N.S. 514 U.S. 386 , 401-402,115 S. Ct.1537.1547-48,131 L.Ed.2d 465 (1995)

The United States Supreme Court also affirmed its prior decision that appellate leave is not required to rule on Rule 60 (b) motion. (Standard Oil Company of California v United States ,429 US 17 ,50 L Ed 2d 21 . 97 S. Ct 31 (1976)

The plaintiff raised issue that the court of appeals provided that plaintiff defaulted on counter claim for damages, thereby admitting the allegations contained therein.

Plaintiff raised issue that gravamen of the counter claim is that plaintiff breached oral agreement and not unexecuted written agrement.

That the counterclaim by the defendant failed to state a claim upon which relief could be granted as a matter of law .The counter claim did not allege terms of oral agreement to which plaintiff was bound by default let alone award of attorney's fees in case of default . The counter claim did not even allege that plaintiff had breached the oral

agreement , instead it alleged that the defendant had breached the oral agreement.

"Upon entry of default judgment ,facts which are not established by the pleadings of the prevailing party,or claims which are not well pleaded are not binding and cannot support a judgment"

Newman Productions v Albright 862 F 2d,1368;1392 (9th Cir.)

. . The plaintiff admitted nothing by default , since there was nothing to a admit therefore , summary judgment could not be sustained .

Furthermore , the award of attorney's fees could not be sustained on additional grounds that the declarations by the plaintiff and the defendant's attorney showed that award of attorney's fees in case of a breach of oral agreement was never agreed upon and the written settlement agreement was never executed.

The petition for rehearing was denied and court awarded defendant additional $16,855.00 in attorney's fees.

ARGUMENTS IN FAVOR OF ALLOWANCE OF THE WRIT

I

CERTIORARI BE GRANTED TO SETTLE A CONFLICT WITHIN THE HOLDINGS OF THE NINTH CIRCUIT COURT AND THIS COURT .

&

TO RESOLVE CONFLICT WITHIN THE NINTH CIRCUIT COURT

&

TO RESOLVE CONFLICT BETWEEN THE NINTH CIRCUIT COURT AND OTHER CIRCUIT COURTS , AFFECTING BASIC PROCEDURAL RIGHTS .

The instant petition addresses important issues of basic procedural rights of the litigant to request relief pursuant to Rule 60 (b) of the Federal Rule of Civil Procedure.

This petitioner has a judgment of over $ 40,000 against him for no fault of his own and without ever having been provided with an

opportunity of a hearing to obtain relief pursuant to F.R.C.P.; Rule 60 (b).

The grounds provided by the district court in denying the request to entertain Rule 60 (b) motion was that the district court had no jurisdiction to Rule on Rule 60 (b) motion since plaintiff had filed Notice of Appeal .
(Appendix E)

The Ninth Circuit Court of Appeals affirmed and cited Carriger v Lewis 971 F 2d at 329;332 (citing Smith v Lujan (supra) (Appendix A ;B)

The court awarded $ 16855.50 in attorney's fees for plaintiff appealing the denial by district court of his motion to request leave to entertain a Rule 60 (b) motion for lack of jurisdiction .

The decision of the Ninth Circuit Court in the instant case is in conflict with this Court's decision which provides that pendency of appeal does not affect the district court's power to grant Rule 60 (b) relief .(Stone v I.N.S. 514 U.S. 386,401-402, 115 S.Ct.1537.1547-48,131 L.Ed.2d 465 (1995).

This Court also affirmed its prior decision that appellate leave is not required before district court

entertains a Rule 60 (b) motion.Standard Oil Company of California v United States 429 US 17 ,50 L Ed 2d 21 . 97 S. Ct. 31 (1976)

Even the Ninth Circuit Court, in November 1997 , based upon decision of this Court reversed its prior ruling on Smith v Lujan ,(supra) and provided that district court has the jurisdiction to rule on Rule 60 (b) motion after appeal is taken. (Stein v Wood);127 F 3d, 1187 , 9th Cir. Nov.1997)

However , in the instant case , the Ninth Circuit Court continues to set aside the decision of the United States Supreme Court and its own latest ruling , to the detriment of the petitioner .

Petitioner 's grounds for relief pursuant to F.R.C.P.; Rule 60 (b) are based upon
(i) Excusable Neglect ; due to attorney negligence pursuant to Augusta Fiberglass Coating Inc.v Fodas Contracting. 843 F 2d 808 (4th Circuit,1988) which provides

" When the party is blameless attorney negligence qualifies as " mistake " or as an "excusable neglect " under rule governing relief from judgment, F.R.C.P. Rule 60(b)(i)"

(ii) newly discovered evidence "

(iii) fraud ,misrepresentation, circumvention and other misconduct

(iv) lack of subject matter jurisdiction.

The position taken by the Ninth Circuit Court is confusing , contradictory and placed plaintiff in a burdensome , catch 22 position for getting a hearing for relief from the default judgment .

On one hand ,it required plaintiff to ask the district court if it would entertain a Rule 60 (b) motion before requesting remand , when plaintiff did that it affirmed that district court had no jurisdiction to rule upon such a motion and also denied motion for remand.

In other words, plaintiff was not entitled to a hearing for relief pursuant to F.R.C.P. ;Rule 60 (b) by district court under any circumstances.

Whereas every other Circuit Court in the country provides that the litigant is entitled to hearing on a F.R.C.P. Rule 60 (b) motion by the district court after Notice of Appeal is filed .

(Commonwealth of Puerto Rico v SS Zoe Colocotroni, 601 F 2d 39,42

(Ist Cir.1979)

(Toliver v County of Sullivan, 957 F 2d 47,49 (2nd Cir. 1992) citing

(Ryan v United States Line Co.303 F 2d 430,434 (2nd.Cir.1962)

(United States v Accounts Nos.3034504504 & 144-07143, 971 F 2d 974,988

(3rd. Cir. 1992)

(Travelers Ins.Co v Liljeberg Enterprises,Inc. 38 F 3d 1404 ,1407 n 3

(5th Cir. 1994)

(First National Bank of Salem v Hirsch, 535 F 2d 343 ,346 & n2

(6th Cir. 1976)

(Brown v United States,976 F 2d 1104,1110-1111

(7th Cir. 1992)

(Simon v Gorsuch, 715 F 2d 1248 ,1252

(7th Cir. 1983)

(Pioneer Ins. Co. v Gelt, 558 F 2d 1303, 1311-1312

(8th Cir. 1977)

(Aldrich Enterprises,Inc. v United States, 938 F 2d 1134

(10th Cir. 1991)

(Hoai v Vo, 935 F 2d 308 .312

(D.C. Cir.1991)

It is crucial that the conflict be resolved by this Court. The 1995 decision of this Court ,1997 decision of the Ninth Circuit Court itself and every other Circuit Court supports petitioner's right to hearing for relief pursuant to Federal Rule of Civil Procedure ; Rule 60 (b) motion .

The plaintiff was unfairly denied this right and instead was penalized with a huge award for attorney's fees for no fault of his own and for appealing denial of such procedural right for a hearing requesting relief from judgment .

Punishing petitioner for the negligence of his attorney is just as unreasonable as punishing a patient for the negligence of his or her physician.

The petitioner has spent hundreds of hours in the appellate process in trying to overcome the damage caused by the negligence of his attorney in order to save himself from a major financial catastrophe.

CONCLUSION

In Stone , this Court provided:

" A motion filed , under Rule 60 (b) of the Federal Rule of Civil Procedure for relief from a judgment more than 10 days after the judgment is issued does not toll the running of the time for taking an appeal; the pendency of the motion before a Federal District Court does not affect the continuity of a prior taken appeal; and the pendency of an appeal does not affect the District Court's power to grant Rule 60 relief."

(Stone v INS 514 U.S. 386 ,401-402,115 S.Ct.1537,1547-48.131 l.Ed.2d 465 (1995)

In this case the petitioner presents a claim raising fundamental procedural rights for requesting a hearing for relief pursuant to Federal Rule of Civil Procedure Rule 60 (b).

The decision of the Ninth Circuit Court in the instant case is in conflict with the opinion of this Court with the latest ruling of the Ninth Circuit itself and every other Circuit Court in the country.

The petitioner has a huge judgment of attorney fees against him for no fault of his own and

without ever having been provided an opportunity to request relief pursuant to F.R.C.P.;Rule 60 (b).

The petitioner is blameless and is being punished for the negligence of his late attorney .

The petitioner is particularly penalized for appealing the unjust denial of a hearing for relief from judgment pursuant to Federal Rule of Civil Procedure ; Rule 60 (b) and awarded against him $ 16,855.00 in attorneys fees .

The petitioner prays that for sake of uniformity of decisions and in the interest of justice such a relief is granted.

Respectfully submitted,

Date; April 30 ,1999

_____

Jehan Z. Mir ,MD
Petitioner / Appellant
Plaintiff Pro-se

APPENDIX A
OPINION OF THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT DATED SEPTEMBER 22, 1998

JEHAN ZEB MIR, MD.,
Plaintiff-Cross Defendant-
Appellant,

v.

FHP INC., a corporation,
Defendant-counter
claimant-Appelle,

and

RAMIRO RUEDAS,

Defendant.

Appeal from the United States District Court
for the Central District of California
John G. Davies Judge, Presiding

September 22, 1998

No.97-55424
D.C. No. CV-95-07523-JGD

Memorandum

Before O'SCANNLAIN, FERNANDEZ, and
TASHIMA, Circuit Judges

Jehan Zeb Mir appeals pro se the district court's grant of summary judgment for defendant FHP, Inc. on Mir's action for payment of medical services that he rendered on behalf of decedent Bernardino Ruedas, who was a member on an employee group health care plan administered by FHP. The district court exercised its removal jurisdiction pursuant to ERISA[1] preemption, and subsequently granted summary judgment for FHP, concluding that, by filing the instant action, Mir had breached the terms of a settlement agreement reached in a prior action between Mir and FHP ("MIR 1") that involved the identical dispute. We have jurisdiction pursuant to 28 U.S.C. 1291, and we affirm.

---

[1] The employee Retirement Income Security Act, 29 U.S.C. 1001-1461.

Mir contends that the district court erred by (1) exercising its removal jurisdiction; (2) granting summary judgment for FHP; (3) awarding FHP attorney's fees against Mir for breach of the settlement agreement in MIR 1; and (4) denying his Fed. R. Civ. P. (60) motion for lack of subject-matter jurisdiction. These contentions lack merit.

We review de novo a district court's grant of summary judgment and its determination that removal of an action is proper based upon ERISA preemption. *See Emard v. Hughes Aircraft Co.*, No.96-56584, 1998 WL 510845, at *1 (9th Cir. Aug. 20, 1998). We also review de novo a district court's denial of a Rule 60(b) motion for lack of subject-matter jurisdiction. *See Carriger v. Lewis*, 971 F.2d 329, 332 (9th Cir. 1992) (en banc). We may affirm

on any basis fairly supported by the record. *See Foster v. Skimmer,* 70 F.3d 1084, 1087 (9th Cir. 1995)(Per curiam).

We conclude that the distric court properly exercised removal jurisdiction, because the record demonstrates that Mir's action directly implicated the terms of the FHP health plan and therefore, was preempted by ERISA. *See Bast v. Prudential Ins. Co.,* No 97-35429, 1998 WL 462694, at *6-7 (9th Cir. Aug. 3, 1998); *Parrino v. FHP, Inc.,* 146F.3d 699, 704-05(9th Cir. 1998); *cf. Meadows v. Employers Health Ins.,* 47 F.3d 1006, 1009-11 (9th Cir. 1995)(holding that a third party health care provider's action was not preempted because the action did not implicate the administration of an ERISA a plan).

We conclude that the district court properly granted summary judgment for FHP, because the uncontroverted facts resulting from Mir's failure to file an opposition to FHP's summary judgment motion established that Mir had breached the settlement agreement in MIR 1 when he instituted the instant action against FHP. *See Emard,* 1998 WL 510845, at *1.

We also conclude that the district court's award of attoney's fees to FHP was proper, becuase the settlement agreement in MIR 1 provided that the prevailing party in subsequent litigation over the agreement would be entitled to recover its attorney's fees, *see Benny v. Pipes,* 799 F.2d 489, 495 (9th Cir. 1986), *amended by* 807 F.2d 1514 (9th Cir. 1987), and Mir defaulted on FHP's

counterclaim for damages, thereby admitting the allegations contained therein[2]

Finally, we conclude that the district court properly denied Mir's Rule 60(b) motion for lack of subject-matter jurisdiction because Mir filed the motion after he had appeal the district court's grant of summary judgment for FHP to this court. *See Carriger*, 971 F.2d at 332.

Mir's remaining contention regarding FHP's purported sanctionable conduct in district court lacks merit.

We deny FHP's request for attorney's fees on appeal without prejudice to the filing of a separate motion requesting an award of such

[2] Moreover, we note that Mir has waived his right to contest the amount of attorney's fees awarded to FHP by failing to raise this issueon appeal. *See Sablan v. Department of Fin.*, 856 F.2d 1317, 1327-28 (9th Cir. 1988).

fees. *See Gabor v. Frazer,* 78 F.3d 459-60(9th Cir. 1996)(order).

AFFIRMED.

APPENDIX B
REHEARING ORDER OF THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT DATED FEBRUARY 8, 1999

JEHAN ZEB MIR, M.D.,
Plaintiff-Cross Defendant-
Appellant,

v.

FHP INC., a corporation,
Defendant-counter-claimant
Appellee,

and

RAMIRO RUEDAS,
Defendant.

United States Court Of Appeals
For The Ninth Circuit

February 8, 1999

No. 97-55424
DC# CV-95-07523-JGD

Order

Before O'SCANNLAIN, FERNANDEZ, and
TASHIMA, Circuit Judges.

The panel has voted to deny appellant's petition for hearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en bacn. *See* Fed. R. App. P. 35.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected. FHP's request for attorney's fees is granted and fees are awarded to FHP in the amount of $16,855.50.

APPENDIX C
ORDER OF THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT ON APPELLANT'S MOTION FOR REMAND DATED JULY 16, 1997

JEHAN ZEB MIR, MD
Plaintiff/Cross-Defendant/
Appellant,

vs.

FHP INC.,
Defendant/counter-claimant/
Appelle,

RAMIRO RUEDAS,
Defendant-Appellee.

United States Court Of Appeals
For The Ninth Circuit

July 16, 1997

No. 97-55424
DC # CV-95-7523-JGD

ORDER

Before PETER L. SHAW, Appellate Commissioner

Appellant's "amended motion [for] full remand to state court" is denied without prejudice to renewing the arguments in the briefs. Appellant's alternative motion to remand the proceedings to the district court is denied without prejudice to refiling accompanied by proof that the district court had indicated its willingness to entertain the Fd. R. Civ. P. 60(b) motion to vacate judgment. See Smith v. Lujan, 588 F.2d 1304, 1307 (9th Cir. 1979).

Appellant's motion for new briefing schedule is granted, in part. Appellant's opening brief and excerpts of record are due August 11, 1997; appellees' brief is due September 10, 1997; the optional reply brief is due within 14 days after service of appelless brief.

Appellant's motion for sanctions and attorney's fees is denied.

Peter L. Shaw, General Order 6.3(e)

APPENDIX D
ORDER BY THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT DATED OCTOBER 14, 1997

JEHAN ZEB MIR, M.D.,
Plaintiff/Cross-Defendant/
Appellant,

vs.

FHP, INC.,
Defendant/Counter-Claimant/
Appellee,

RAMIRO RUEDAS,
Defendant/Appellee.

United States Court Of Appeals
For The Ninth Circuit

October 14, 1997

No. 97-55424
DC# CV 95-7523-JGD

ORDER

Before: THOMPSON and T.G. NELSON, Circuit Judges

Appellant's motion for clarification and reconsideration of the court's July 16, 1997 order is denied.

This Case is ready for calendaring.

APPENDIX E
ORDER DENYING HEARING FOR RULE 60 (b) MOTION BY UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION DATED MAY 8, 1997

JEHAN ZEB MIR, MD., Plaintiff,

v.

FHP, INC., a corporation, RAMIRO RUEDAS, an individual, and DOES 1 through 50
Defendants.

United States Distric Court
Central District of California
Western Division

May 8, 1997

Case No. CV 95-7523 JGD (SHx)

Order Denying Plaintiff's Motion Requesting Leave To File Motion Pursuant to Rule 60

Before JOHN G. DAVIES, United States District Judge

The Court has reviewed the written submissions of the parties in connection with Mir's Motion to Grant Hearing on Rule 60 Motion.

The motion is Denied. The Court no longer has jurisdiction over the case. No grounds are stated that would justify the extraordinary relief requested.

IT IS SO ORDERED.

JOHN G. DAVIES
United States District Judge

APPENDIX F
ORDER GRANTING MOTION FOR ATTORNEY'S FEES BY UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION DATED FEBRUARY 19, 1997

JEHAN ZEB MIR, MD., Plaintiff

v.

FHP, INC., a corporation, RAMIRO RUEDAS, an individual, and DOES 1 through 50, Defendants.

United States District Court
Central District of California
Western Division

February 19, 1997

Case No. CV 95-7523 JGD (SHx)

Order Granting Defendants' Motion For Attorney's Fees, Alternatively, Motion To Amend Judgment

Before JOHN G. DAVIES, United States District Judge

Factual Background

On September 16, 1996, the defendants' Motion for Attorneys' Fees; Alternatively Motion to Amend Judgment came on for hearing. Having considered the parties' written submissions and the oral argument of counsel, the court hereby GRANTS the motion for the reasons set forth below.

On August 24, 1994, Jehan Zeb Mir, M.D. filed a First Amended Complaint for damages for Refusal to Pay Medical Bills in California Superior Court, County of Los Angeles. The Complaint alleged that on May 12, 1991, Bernardino Ruedas ("Ruedas") was stabbed at a party in Long Beach, California. Ruedas was taken to the emergency room of St. Francis Hospital in Lynwood, California for treatment. Mir was the surgeon on

call at the hospital and treated Ruedas, but Ruedas subsequently died from shock. On May 5, 1991, Mir submitted a bill in the amount of $11,275 to Ruedas' insurer, FHP, Inc., for the services rendered to Ruedas. The bill was never paid.

The Complaint alleged three causes of action: (1) declaratory relief for the amount of medical fees due and owing (11,275); (2) breach of contract as between Ruedas and FHP; and (3) breach of the covenant of good faith and fair dealing. the second and third claims were based on the allegation that Ramiro Ruedas, as Representative of the State of Ruedas, "assigned all rights and privileges to the plaintiff to make a demand on the defendants for payment of his medical bills."

On September 14, 1994, the action was removed by FHP to this Court (Case number CV 94-6211 JGD (Kx)).

On January 11, 1995, FHP mailed Mir a request to dismiss all claims on grounds they were preempted by ERISA. On January 19, 1995, FHP contacted Mir and offered to settle for 5,500. Mir rejected FHP's $5,500 offer by mail, and countered with an offer to settle for $11,275 plus interest. On January 19, 1995, FHP mailed Mir a rejection of Mir's counteroffer. The next day, on January 20, 1995, Mir's counsel advised FHP that Mir would represent himself pro se in the litigation.

On February 7, 1995, FHP filed a Motion for Summary Judgment scheduled for hearing on February 27, 1995. On February 8, 1995, FHP and

Mir held a Meeting of Counsel where FHP again offered to settle for $5,500. On February 24, 1995, Mir filed a Motion to Remand to Superior Court.

At the scheduled deposition of Mir on February 28, 1995, FHP and Mir allegedly discussed settlement, and had two further conversations concerning settlement, and had two further conversations concerning settlement by telephone that evening. As a result of these discussion, the parties came to an oral agreement to settle the case for $6,000, and to withdraw the pending motions for summary judgment and for remand. FHP informed Mir that it would prepare the settlement documentation accordingly.

On March 3, 1995, FHP informed Mir that it was preparing a settlement check and would

forward a written Settlement Agreement to Mir for his signature. The Agreement was sent to Mir on March 14, 1995. FHP informed Mir that once he signed the Agreement and FHP received it, FHP would send the $6,000 settlement check.

On March 15, 1995, the parties signed a Stipulation to Take Plaintiff's Motion to Remand and Defendants' Motion for Summary Judgment Off Calendar ("Stipulation") because "the parties have entered into a settlement of this dispute . . ."

The Stipulation stated: "It is hereby agree and stipulated that Plaintiff Jehan Zeb Mir, M.D.'s Motion to Remand and Defendant FHP, Inc.'s Motion for Summary Judgment currently scheduled to be heard on March 20, 1995, in Department 890 of the above entitled court, be

taken off calendar as both parties have entered into a settlement of the action.

It is further stipulated that upon execution of the settlement documentation a dismissal of the action shall be promptly filed with the Court."

On March 20, 1995, FHP contacted the Clerk of Court and requested that the pre-trial conference be taken off calendar. On March 20, 1995, FHP left a message with Mir's office requesting information regarding the status of the Settlement Agreement, but Mir failed to return the phone call. On March 23 and on April 4, 1995, FHP sent letters to Mir, again requesting that he sign and return the Settlement Agreement. On April 7, 1995, FHP telephoned Mir's office, but Mire did not return the

call. On April 10, 1995, FHP had Mir paged, but he did not respond.

On April 10, 1995, the Court entered and Order providing that "the dispute has been settled, and thus the action is hereby dismissed without prejudice." The Order noted that FHP and Mir had failed to file a dismissal.

On April 11 and April 12, 1995, FHP again phoned Mir's office to discuss the Settlement Agreement, but Mir did not respond. On April 18, 1995, FHP mailed Mir a copy of the April 10, 1995 Court Order, again requesting that he sign the Settlement Agreement and forward it so that FHP could release the $6,000 settlement check.

On April 21, 1995, Mir sent FHP a letter stating:

"I have forwarded all of your correspondence in the above referenced matter to my attorney Robert Walker. Since the matter has been dismissed by the Federal Court, filing of substitution papers is irrelevant. Therefore, I suggest that you contact Mr. Walker at the earliest"

On May 9, 1995, FHP sent a letter to Mir and his attorney expressing concern at the lack of response to the communications regarding the Settlement Agreement. On June 5, 1995, FHP called Mir's attorney, Robert Walker. He stated that he would review the file and discuss it with Mir. On June 15, 1995, FHP sent another letter to Mir and Walker, again expressing concerns about

their failure to respond to FHP's attempts to communicate with Mir.

On May 3, 1995, Mir again filed suit against FHP in Superior Court. The Complaint in the second action was amended on September 29, 1995. The Complaint in the new action was based on similar allegations as the first, but differed from the original suit in that brought the second action as a third party beneficiary rather than as an assignee of Ruedas. The case The Meadows v. Employers Health Insurance, 47 Fed.3d 1006 (9th Cir. 1995) was cited in the complaint for the proposition that ERISA does not preempt state law claims by a third party who sues an ERISA plan not as an assignee of a purported ERISA

beneficiary, but as an independent entity claiming damages.

Three claims for damages were alleged in the second complaint: (1) Mir alleged that he was damaged in the amount of $11,275 because FHP breached its duty to Ruedas by failing to pay between Mir and FHP, for the medical services he provided to Ruedas. (2) FHP misrepresented to Mir that FHP would pay for the medical services he provided to Ruedas. (3) FHP violated the "1975 Act dealing with the time for and the manner of payments made to third-party health care providers."

On November 3, 1995, FHP removed the second Complaint to this Court. On November 13, 1995, FHP filed a Counter-Claim for Breach of

Settlement Agreement against Mir. The Counter-claim alleged that Mir breach the oral settlement agreement by (1) refusing to execute the written Settlement Agreement, (2) failing to dismiss the action (CV 94-6211 JGD (Kx) upon which the settlement was based, (3) filing the second action and its original version in Superior Court. FHP claimed damages from having to defend this action and commence the Counter-claim. In the Prayer for Relief of the Counter-claim, FHP petitioned the court for (1) compensatory damages; (2) interest on aid sum from and after March 1, 1995; (3) attorney's fees; (4) cost of the suit.

Mir did not file an answer to FHP's Counter-claim.

On December 19, 1995, the Clerk entered default against Mir on the Counter-claim for failure to file an Answer pursuant to FRCP 55(a) and Local Rule 14.10.

On May 24, 1996, FHP filed a Motion for Summary Judgment; or in the Alternative, Motion to Enforce Settlement Agreement, set for hearing on June 17, 1996. In the motion, FHP moved for summary judgment on grounds that: (1) Mir is barred form relitigating this action because it was settled pursuant to a binding settlement agreement. (2) Mir's failure to execute the written settlement agreement in accordance with the terms of the oral settlement agreement constitutes a breach of the oral agreement.

In support of the motion, FHP offered the unexecuted written settlement agreement and the Stipulation as proof that an oral agreement existed between the parties.

No Opposition to the defendants' motion for summary judgment was filed, and neither Mir or his counsel appeared at the June 17, 1996 hearing on motion. The court granted summary judgment to the defendants.

In the Order granting summary judgment to the defendants the Court provided:

> "Mir fails to demonstrate the existence of any genuine issues of material fact. Because there are no genuine issues regarding the existence of a binding settlement agreement barring re-

litigation of the claims in this action the defendants are entitled to summary judgment on all causes of action in the First Amended Complaint, and on the Counterclaim."

Accordingly, the motion for summary judgment on the First Amended Complaint and the Counterclaim is GRANTED in the present action, case number 95-7523 JGD (SHx)."

On June 29, 1996, the Court entered Judgment in favor of the defendants.

Contained in defendants' motion for summary judgment was a request for an award of attorney's fees based on the terms of the Settlement Agreement and detailed in the Counter-claim.

Discussion

With the instant motion FHP seeks an award of attorney's fees in the amount of $19,491.25, allegedly expended in defending against Mir's second action and prosecuting the Counter-claim. The defendants explain the total includes fees "defending against the plaintiff's claims, prosecuting the counter-claim, attending mandatory hearings, corresponding and telephone conversations between the parties, preparing and filing the motion for summary judgment, attending the hearing on the motion for summary judgment and preparing the motion." The amount includes $1,375.00 in fees for preparation of the instant motion.

In support of the motion, the defendants cite the fact that the Court entered Judgment in their favor in the Counter-claim on June 29, 1996.

In the Opposition, Mir contends that FHP's claim for attorney's fees are without grounds. The argument is encapsulated as follows:

> "Defense counsel now attempts to obtain attorney fees pursuant to the terms of writing . . . which was clearly not executed by anyone. In addition the summary judgment executed by the Court declares that the settlement agreement being enforced was an oral agreement whereby Dr. Mir was to received $6,000 and the matter disposed of. The oral agreement thus enforced was silent as to any attorney fee feature. It was a standard, 'we'll pay $6,000 and send you the closing documents,' which was never formalized. Thus, there is absolutely no basis for an award of attorney fees and costs to the defendant, either for prior proceedings or this motion."

The defendants motion is GRANTED, though not on the particular grounds raised by the

defendant. FHP is entitled to reasonable attorney's fees not pursuant to the terms of the unexecuted Settlement Agreement, but based on fundamental contract principle. In granting FHP's motion for summary judgment on the Counter-claim, and later, Judgment in favor of FHP, the Court found that an agreement existed between the parties to settle the dispute. "Mir is barred from re-litigating this action because it was settled pursuant to a binding settlement agreement. Such attempts [to re-litigate] constitute a breach of the agreement. Additionally, Mir's failure to execute the written settlement agreement in accordance with the terms of the oral agreement constitutes a breach of the oral agreement." Order, June 28, 1996 at 11.

If FHP had had the "benefit of its bargain," it would not have incurred additional litigation expenses and attorney's fees subsequent to the settlement. Mir breached that agreement, and is consequently liable for the damages suffered by FHP that arise from the breach. Such damages include the attorney's fees the defendants now seek. On this basis, FHP is properly entitled to an award of its reasonable attorney's fees.

Dr. Mir's counsel, Robert Walker, appears to imply that the plaintiff's failure to oppose FHP's motion for summary judgment or appear for the hearing held on June 17, 1996, may somehow have resulted from problems with notice. The Opposition states:

> "The first time that Dr. Mir's counsel became aware of what had transpired at the June 17th summary judgment hearing was

> when he read the judgment attached tot he instant motion. That judgment bears a service list that does not contain the street address of Dr. Mir's counsel, which is 3250 Whilshire Boulevard. It is believed that the judgment never reached the offices of counsel for Dr. Mir, but if it did, it was never brought to the attention of counsel--which would be very irregular in light of counsel's mail handling protocol."

Plaintiff's Memorandum of Points and Authorities and Declaration of Robert D. Walker in Opposition to Defendant FHP, Inc's Motion for Attorney's Fees, p. 4.

The plaintiff's argument concerning notice is unpersuasive, and is not valid grounds to challenge the Court's ruling on the motion for summary judgment, or to deny the defendants' current motion for attorney's fees.

Irrespective of proper service, its apparent that Mir's lawyer, Mr. Walker, knew of the motion for

summary judgment and the hearing date, as well as FHP's intention to proceed with both, prior to the June 17, 1996 hearing. Walker was informed of this by defendants' counsel both in a telephone conversation Walker had with FHP's lawyer Francis Drelling on June 14, 1996, and by fax and mail on June 14, 1996. See Reply, Exhib. A. During the June 14, 1996 telephone conversation, Mr. Walker stated to Mr. Drelling that he was uncertain whether he would be able to appear at the June 17, 1996 hearing on the motion because he had a conflicting appointment. The declaration states that Walker was on vacation at the time of the hearing.

In a declaration accompanying the plaintiff's Ex Parte Application for Order Continuing Hearing

Date For Motion for Attorney's Fees, filed on August 1, 1996, Mr. Walker indicates that he knew of the motion for summary judgment, but had though that it was "rendered moot by our settlement." In the opposition, Walker states "[w]hen defense counsel filed the motion for summary judgment or in the alternative to enforce the settlement agreement, Dr. Mir and present counsel agreed that the case had to be settled . . ." Opp. at 3. This statement implies knowledge of the motion prior to the hearing.

Based on the foregoing, it is clear that Mir's counsel was aware of the pending motion for summary judgment against his client prior to the hearing date. Yet Mr. Walker failed to communicate with the Court concerning the motion

in any fashion, either in the form of a request for a continuance or any response to the motion Walker did not pursue a stipulation with FHP's counsel to continue the hearing or withdraw the motion, nor did he seek any confirmation for his supposed belief the motion had become "moot". Indeed, Walker was expressly informed by FHP that it intended to proceed with the motion at the noticed June 17, 1996 hearing. Thus, the plaintiff's arguments concerning notice do not affect the Court's disposition of the defendants' motion.

The amount of the fees requested by the defendants appears reasonable to the Court. Thus, it is HEREBY ORDERED that the defendants shall recover reasonable attorney's fees in this action in the amount of $19,491.25.

Conclusion

The motion is GRANTED. The court orders that the defendants shall recover reasonable attorney's fees in this action in the amount of $19,491.25.

ITS IS SO ORDERED.

JOHN G. DAVIES
United States District Judge

APPENDIX G
OPINION OF THE UNITED STATES DISTRICT COURT , CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION DATED JUNE 26, 1996

JEHAN ZEB MIR, M.D., Plaintiff

v.

FHP, INC., a corporation, RAMIRO RUEDAS, an individual, and DOES 1 through 50, Defendants.

United States District Court
Central District of California
Western Divison

June 26, 1996

Case No. CV 95-7523 JGD (SH x)

Order Granting Summary Judgment On First Amended Complaint And Counterclaim

Before JOHN G. DAVIES, United States District Judge

On June 17, 1996, the defendant's Motion for Summary Judgment; or, in the Alternative, Motion to Enforce Settlement Agreement, came on for hearing. The plaintiff failed to file an opposition or appear at the hearing. Having considered the defendant's written submissions and the oral argument of counsel, the Court hereby GRANTS the motion for the reasons set forth as follows.

Discussion

Summary Judgment Standard

The Federal Rules of Civil Procedure provide for summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that he moving party entitled to

judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court clarified the standard for summary judgment in three important cases. See Celotex Corporation v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electrical Industry Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

The moving party bears the initial burden of demonstrating the absence of a "genuine issue of material fact for trial." Anderson 477 U.S. at 256. A fact is material if it could affect the outcome of the suit under the governing substantive law. Id. at 248. If the moving party seeks summary adjudication with respect to a claim or defense upon which it bears the burden of proof of trial, its burden must be satisfied by affirmative admissible

evidence. By contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence from the non-moving party. The moving party need not disprove the other party's case. See Celotex, 477 U.S. at 325.

When the moving party meets it burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. Rule 56(e). Summary judgment will be entered against the non-moving party if that party does not present such specific facts. Id.

In assessing whether the non-moving party has raised a genuine issue, its evidence is to be believed, and all justifiable inferences are to be

drawn in its favor. Anderson, 477 U.S.at 255 (citing Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970)). The non-moving party must come forward with more than "the mere existence of a scintilla of evidence." Id. at 252. As the Court explained in Matsushita:

> " When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . Where the record taken as a whole could not lead a rational trier of facts to find for the nonmoving party, there is not "genuine issue for trial."
>
> 475 U.S. at 586-87.

The facts relied upon must be admissible under the rules governing the admission of evidence generally. Hal Roach Studios, Inc. v. Richard

Feiner and Co., Inc., 896 F.2d 1542 (9th Cir. 1990).

The plaintiff in this action failed to file a Statement of Genuine Issues, any controverting evidence, or an opposition to the motion. Local Rule 7.14.3 states the following:

> In determining any motion for summary judgment, the court will assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the "Statement of Genuine Issues" and (b) controverted by declaration or other written evidence filed in opposition to the motion.

The Court finds, pursuant to Local Rule 7.14.3, that the following facts are adequately supported and exist without controversy.

A. Jehan Zeb Mir, M.D., v. FHP, Inc., and Does 1 through 100, CV 94-6211 JGD (Kx)

On August 24, 1994, Jehan Zeb Mir, M.D. ('Mir") filed a First Amended Complaint for Damages for Refusal to Pay Medical Bills in the Superior Court of the State of California for the County of Los Angeles. Statement of Uncontroverted Facts ("S.U.F.") No. 1, Motion.

The First Amended Complaint alleged that on May 12, 1991, an individual by the name of Bernardino Ruedas ("Ruedas") was stabbed at a party in Long Beach, California. Exh. C, 12, Motion. Mir treated Ruedas as the surgeon on call in the emergency room of St. Francis Hospital in Lynwood, California. Ruedas, however, died from shock. Exh. C, 6, Motion. On May 21, 1991, Mir submitted a bill in the amount of $11,275 to

Ruedas' insurer, FHP, Inc., for the medical services he performed for Ruedas. Exh. C, 7, Motion.

The First Amended Complaint alleged three causes of action: (1) declaratory relief for the amount of medical fees due and owing (11,275); (2) breach of contract as between Ruedas and FHP; and (3) breach of the covenant of good faith and fair dealing as between Ruedas and FHP.

The second and third claims of the First Amended Complaint were based on the allegation that Ramiro Ruedas, as Representative of the Estate of Ruedas, "assigned all rights and privileges to the plaintiff to make a demand on the defendants for payment of his medical bills." Exh. C, 13, Motion.

On September 14, 1994, FHP removed the action to this Court. S.U.F. No.5, Motion. The action was assigned case number CV 94-6211 JGD (Kx). On January 11, 1995, FHP mailed Mir a request that all claims be dismissed on the ground that they were preempted by ERISA. S.U.F. No. 6, Motion.

On January 20, 1995, Mir's counsel advised FHP that Mir would represent himself pro se in the litigation. S.U.F. No. 10, Motion.

On February 7, 1995, FHP filed a Motion for Summary Judgment, which was scheduled for hearing on February 27, 1995. S.U.F. No. 11, Motion. On February 8, 1995, FHP and Mir held a Meeting of Counsel during which FHP again offered to settle the action for $5,500. S.U.F.

Nos.12, 13, Motion. On February 24, 1995, Mir filed a Motion to Remand the action to the Superior Court of the State of California. S.U.F. No. 14, Motion.

FHP deposed Mir on February 28, 1995. During the deposition, the parties discussed settlement. S.U.F. No. 15, Motion. Mir and FHP also discussed settlement during two telephone conversations that evening. As a result, the parties orally agreed to settle the case for $6,000, and to withdraw the motions for summary judgment and for remand. S.U.F. Nos. 16-18, Motion. FHP advised Mir that it would prepare the Settlement Agreement, Compromise and Mutual Release ("Settlement Agreement"). S.U.F. No. 19, Motion.

On March 3, 1995, FHP informed Mir that the company had endorsed a settlement check payable to him, and intended to forward a written Settlement Agreement to him for his signature. Agreement to Mir, and informed him that once he signed the Settlement Agreement and FHP received it, the company would send the $6,000 settlement check. S.U.F. Nos. 21, 22, Motion; Exh. B, Motion.

The Settlement Agreement is based on the First Amended Complaint in case number CV 94-6211 JGD (Kx). S.U.F. No. 23, Motion; Exh. B, Motion. Paragraph 4.01 of the Settlement Agreement drafted by FHP states:

> In consideration of a mutual waiver of costs, the bilateral execution of this

Agreement, and the payment of Six Thousand Dollars (6,000.00) to [Mir], [Mir] agrees to a full and final settlement of all actions against FHP, and shall dismiss, with prejudice, the entire Subject Action against FHP, which is the subject of this agreement.

S.U.F. No. 24, Motion; Exh. B, at 3, Motion.

On March 15, 1995, FHP and Mir signed the Stipulation to Take Plaintiff's Motion to Remand and Defendant's Motion for Summary Judgment Off Calendar ("Stipulation"). S.U.F. No. 25, Motion; Exh. B, Motion. The Stipulation stated:

It is hereby agreed and stipulated that Plaintiff Jehan Zeb Mir, M.D.'s Motion to Remand and Defendant FHP, Inc.'s Motion for

Summary Judgment currently scheduled to be heard on March 20, 1995, in Department 890 of the above entitled court, be taken off calendar as both parties have entered into settlement of action.

It is further stipulated that upon execution of the settlement documentation a dismissal of the action shall be promptly filed with the Court.

Exh. A, Motion.

On March 20, 1995, FHP contacted the Clerk of Court and requested that the pre-trial conference be taken off calendar because the parties had reach a settlement. S.U.F. No. 27, Motion.

On March 20,l 1995, FHP left a message with Mir's office requesting information regarding the

status of the Settlement Agreement, but Mir failed to return the phone call. S.U.F. No. 28, Motion. On March 23 and April 4, 1995, FHP sent letters to Mir, again requesting that he sign and return the Settlement Agreement. S.U.F. Nos.29, 30, Motion. On April 7, 1995, FHP telephoned Mir's office, but Mir did not return the call. S.U.F. No. 32, Motion. On April 10, 1995, FHP has Mir paged, but he did not respond. S.U.F. No. 33, Motion.

On April 10, 1995, the Court, nothing that FHP and Mir had failed to file a notice of dismissal, issued an Order dismissing the action, which stated that "the dispute has been settled, and thus the action is hereby dismissed without prejudice." S.U.F. No. 34, Motion; Exh. Q, Motion.

On April 11 and April 12, 1995, FHP called Mir's office to discuss the Settlement Agreement, but he did not respond. S.U.F. Nos. 35, 36, Motion. On April 18, 1995, FHP sent him a copy of the April 10, 1995 Court Order, again requesting that he sign the Settlement Agreement, and forward it so that FHP could release the $6,000 settlement check. S.U.F. No. 38, Motion; Exh. R, Motion.

On April 21, 1995, Mir sent FHP a letter stating:

> I have forwarded all of your correspondence in the above referenced matter to my attorney Robert Walker. Since the matter has been dismissed by the Federal Court, filing of substitution papers is irrelevant. Therefore, I suggest that you

contact Mr. Walker at the earliest.

Exh. S, Motion; S.U.F. No. 39, Motion.

On May 9, 1995, FHP sent a letter to Mir and his attorney expressing concern at the lack of response to the aforementioned communications regarding the Settlement Agreement. S.U.F. No. 40, Motion; Exh. T, Motion. On June 5, 1995, FHP called Mir's attorney, Robert Walker. He stated that he would review the file and discuss it with Mir. S.U.F. No. 41, Motion. On June 15, 1995, FHP sent another letter to Mir and Walker, again expressing concern about their failure to respond to FHP's attempts at communication with Mir. S.U.F. No. 42, Motion; Exh. U, Motion.

B. Jehan Zeb Mir, M.D., v. FHP, Inc., Ramiro Ruedas, and Does 1 through 50,

Inclusive, CV 95-7523 JGD (Shx)

On May 3, 1995, Mir filed a complaint for breach of contract against FHP in the Superior Court of the State of California for the County of Los Angeles. S.U.F. No. 44, Motion. Mir filed a First Amended Complaint for Damages in the same action on September 29, 1995. S.U.F. No. 45, Motion.

The First Amended Complaint alleges that, on May 12, 1991, Ruedas was stabbed at a party in Long Beach, California. First Amended Complaint 9, Motion. Emergency room personnel summoned Mir, who performed emergency surgery on Ruedas at St. Francis Hospital in Lynwood, California, but the surgery was unsuccessful and Ruedas died. First Amended Complaint 9, Motion. On May 5,

1991, Mir submitted a bill in the amount of $11,275.00 to FHP for the services rendered to Ruedas. First Amended Complaint 10, Motion.

The First Amended Complaint alleges three claims for damages. The first claim alleges that Mir was damaged in the amount of $11,275 because FHP breached its duty to Ruedas by failing to pay Mir (a third-party beneficiary of the insurance contract between Mir and FHP) for the medical services he provided to Ruedas. First Amended Complaint 10-13, Motion. The First Amended claim alleges that FHP misrepresented to Mir that FHP would pay for the medical services he provided to Ruedas. First Amended Complaint 17, Motion. The third claim alleges that FHP violated the "1975 Act dealing with the time for

and the manner of payments made to third-party health care providers." First Amended Complaint 25, Motion.

On November 3, 1995, FHP removed the First Amended Complaint to this Court. The action was assigned case number 95-7523 JGD (Shx). On November 13, 1995, FHP filed a Counterclaim for Breach of Settlement Agreement against Mir. The Counterclaim alleged that Mir breached the oral settlement agreement by (1) failing to execute the written Settlement Agreement, (2) failing to dismiss the action upon which the settlement was based, and (3) filing the First Amended Complaint and its original version in the Superior Court of the State of California. On December 19, 1995, the

Clerk of Court entered default against Mir on the Counterclaim.

On May 24, 1996, FHP filed a Motion for Summary Judgment; or in the Alternative, Motion to Enforce Settlement Agreement. FHP moves for summary judgment on the First Amended Complaint and on the Counterclaim in the present action, case number 95-7523 JGD (Shx).

FHP moves for summary judgment on the following grounds. Mir is barred from re-litigating this action because it was settled pursuant to a binding settlement agreement. Such attempts constitute a breach of the agreement. Additionally, Mir's failure to execute the written settlement agreement in accordance with the terms of the oral settlement agreement constitute a breach of the

oral agreement. In support of the motion, FHP offers proof that there exists an oral agreement, evidenced in writing, between FHP and Mir to settle all claims relating to the medical services Mir performed on May 12, 1991. Motion, at 1. Such evidence of the oral agreement includes the unexecuted written settlement agreement and the Stipulation. See Mahboob v. Department of Navy, 928 F.2d 1126, 1128-30 (Fed. Cir. 1991) (an oral settlement agreement may constitute a binding contract); Scheuler v. Roman Asphalt Corp., 827 F. Supp. 247, 259 (S.D.N.Y. 1993) ("Enforcement of settlements of litigation is customarily based upon client signature, stipulation so-ordered by the

court, or stipulations entered into between counsel on the record.").

Mir fails to demonstrate the existence of any genuine issues regarding the existence of a binding settlement agreement barring relitigation of the claims in this action, the defendants are entitled to summary judgment on all causes of action in the First Amended Complaint, and on the Counterclaim.

Accordingly, the motion for summary judgment on the First Amended Complaint and the Counterclaim is GRANTED in the present action, case number 95-7523 JGD (Shx). Because there is no evidence that defendant Ramiro Ruedas has been served in the action, a final judgment will be entered. See Patchick v. Kensington Publishing

Corp., 743 F.2d 675, 676-77 (9th Cir. 1984);

Insinga v. LaBella, 817 F.2d 1469, 1470 (11th Cir. 1987).

IT IS SO ORDERED. JOHN G. DAVIES
United States District Court